

**Before the
Administrative Hearing Commission
State of Missouri**

MISSOURI DENTAL BOARD,)	
)	
Petitioner,)	
)	No. 11-2156 DB
)	
ELLIOT GLASSMAN, D.D.S.,)	
)	
Respondent.)	

DECISION

Dr. Elliot Glassman’s orthodontics specialty dentist license is subject to discipline for alcohol-induced impairment, breach of professional trust and confidence, and misconduct.

Procedure

The Missouri Dental Board (“the Board”) filed its initial complaint against Dr. Glassman on April 1, 2010. We assigned it case number 10-0498 DB. That complaint alleged Dr. Glassman’s dentist license was subject to discipline for circumstances surrounding his arrest and subsequent guilty plea to driving with excessive blood alcohol content, his alleged failure to report that guilty plea on a subsequent application to renew his dentist’s license, and his alleged violation of a regulation of the Bureau of Narcotics and Dangerous Drugs of the Department of Health and Senior Services. We served Dr. Glassman with notice of that case, a copy of the complaint, and notice of hearing by certified mail on May 5, 2010. Dr. Glassman, represented by Blitz, Bardgett, & Deutsch, L.C., filed an answer to the complaint on May 12, 2010.

On October 28, 2011, the Board filed its second complaint against Dr. Glassman, to which we assigned case number 11-2156 DB. That complaint alleged Dr. Glassman’s dentist license was subject to discipline for circumstances surrounding his treatment of a minor child.

We served Dr. Glassman with notice of that case, a copy of the complaint, and notice of hearing by certified mail on November 5, 2011. Dr. Glassman, again represented by Blitz, Bardgett, & Deutsch, L.C., filed an answer to the complaint on December 5, 2011. On December 5, 2011, Dr. Glassman filed a motion to consolidate the two cases. We granted the motion on December 20, 2011.

We held a hearing on the consolidated cases on April 5, 2012. The Board was represented by Tina M. Crow Halcomb, while Dr. Glassman was represented by James B. Deutsch and Thomas R. Schwarz, Jr. of Blitz, Bardgett, & Deutsch, L.C. The matter became ready for our decision on January 7, 2013, the date the last brief was filed.

Findings of Fact

1. Dr. Glassman held a Missouri orthodontics dental specialty license that, at all relevant times, was current and active.

Count I¹ - the BAC incident

2. On December 17, 2007, Dr. Glassman was stopped and arrested in the parking lot of his office for driving with excessive blood alcohol content (BAC). He was charged either with driving while intoxicated, or with driving with excessive BAC.

3. Dr. Glassman was intoxicated when he drove to his office on December 17, 2007.

4. On that day, Dr. Glassman drove to his office intending to practice dentistry when he arrived there.

5. Dr. Glassman entered an *Alford* plea of guilty to the charge of excessive BAC on June 3, 2008.

¹ While the Board did not expressly deem the subjects we call “Counts” as such in its complaints, both parties organized their post-hearing filings based on these topics, and this organization aids our discussion.

Count II- Renewal Application

6. On November 28, 2008, one of Dr. Glassman's employees, on Dr. Glassman's behalf, electronically filed a 2008 Dental Specialty License Renewal Application.²

Count III- BNDD Violation

7. On or about June 8, 2004, the Missouri Department of Health and Senior Services' Bureau of Narcotics and Dangerous Drugs ("BNDD") issued Dr. Glassman a controlled substances registration ("BNDD registration") for his location at 2388 Schultz Road, Suite A-55, St. Louis, Missouri.

8. At no relevant time did Dr. Glassman practice dentistry or provide patient care at 2388 Schultz Road, Suite A-55, St. Louis, Missouri.

9. Dr. Glassman did not write prescriptions for controlled substances at the Schultz Road location.

10. Dr. Glassman's BNDD registration as referenced above expired on June 30, 2007.

11. On January 9, 2008, Dr. Glassman wrote a prescription for hydrocodone /APAP 10-650mg³ for patient S.B.

12. On January 21, 2008, Dr. Glassman wrote a prescription for hydrocodone/APAP h10-650mg for patient W.G.

13. On February 8, 2008, Dr. Glassman, or someone acting for him, applied for, and BNDD issued to him, a controlled substance registration for his administrative office location at 709 S. Fifth Street, St. Charles, Missouri.

² The absence of additional findings of fact is discussed in the Conclusions of Law under "Count II- Renewal Application."

³ Hydrocodone is a Schedule II controlled substance. Section 195.017.4(1)(a)j. Statutory references are to RSMo Supp. 2012 unless otherwise noted.

14. At no relevant time did Dr. Glassman practice dentistry or provide patient care at 709 S. Fifth St., St. Charles, Missouri.⁴

15. At no relevant time did Dr. Glassman write prescriptions for controlled substances at the S. Fifth St. location.

16. On February 25, 2008, Susan McCann, Administrator of the BNDD, wrote Dr. Glassman a letter in which she informed Dr. Glassman of the following:

- He had not had authority to conduct controlled substance activities at any time his billing address had been used for his BNDD registration location;
- Any controlled substance activities he may have conducted with controlled substances at any time his billing address was used as his practice address before February 22, 2008 was in violation of state and federal law;
- The letter was a Letter of Censure, sent in lieu of pursuing a disciplinary action against his BNDD registration, was not considered official discipline, and would not be reported to the National Practitioner Databank;
- A copy of the letter would be shared with the Missouri Dental Board and a copy would be kept in his registrant file at BNDD; and
- Future violations of controlled substance laws could result in public discipline of his BNDD registration.⁵
-

17. On February 28, 2008, Dr. Glassman, or someone acting on Dr. Glassman's behalf, submitted to BNDD a "Change of Name- Address Notification" form. That document requested a change of address for BNDD's controlled substance registration from 709 S. Fifth Street, St. Charles, Missouri to 4005 S. Cloverleaf, St. Peters, Missouri 63376.

18. For the 28 years prior to the 2008 events set out above, Dr. Glassman (or those completing the BNDD registration paperwork on Dr. Glassman's behalf) listed his administrative office, as opposed to one or more of the offices where he practiced dentistry or prescribed controlled substances, as the relevant address for the registration.

⁴ The Board's complaint erroneously alleges that Dr. Glassman's S. Fifth Street location was a practice location, and that the prescriptions for hydrocodone /APAP 10-650mg set out in findings of fact 11 and 12 above were written there.

⁵ Petitioner's Ex. E-1.

Count IV- Patient Care Complaint

19. On or about June 29, 2010, Dr. Glassman treated patient A.B.
20. During the procedure, A.B.'s lip was cut. The cut occurred when A.B.'s tongue slipped out from an assistance mirror, hitting Dr. Glassman's handpiece.⁶
21. Dr. Glassman or his staff applied pressure to the cut to stop the bleeding.
22. Dr. Glassman and his staff explained to A.B. and A.B.'s mother what occurred while both were in Dr. Glassman's office on June 29, 2010.
23. Dr. Glassman or his staff sent A.B. home with a cup of cotton rolls, instructing her to maintain pressure on the cut until the bleeding stopped.
24. The bleeding had stopped by the time A.B. and her mother left Dr. Glassman's office.
25. On or about September 9, 2010, A.B.'s mother filed a complaint against Dr. Glassman with the Board, alleging Dr. Glassman failed to tell her or A.B. about the cut, failed to provide first aid or an injury report, and provided A.B. with poor-fitting retainers, which allowed A.B.'s teeth to shift improperly.

Conclusions of Law

We have jurisdiction to hear the Board's complaint.⁷ The Board has the burden to prove facts on which it may discipline Dr. Glassman under the law.⁸ It cites the following provisions of § 332.321.2 as grounds for discipline of Dr. Glassman's license:

- (1) Use of any controlled substance, as defined in chapter 195, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by this chapter;

⁶ A "handpiece" is a hand-held device that engages rotary instruments used for removing tooth structures, cleaning teeth, and polishing dental restorations, connected to a dental engine by an adjustable arm in the case of a belt-driven instrument or by flexible tubing if air-driven. *Dorland's Illustrated Medical Dictionary* 820 (32nd ed. 2012).

⁷Section 332.321.2.

⁸*Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

* * *

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of, or relating to one's ability to perform, the functions or duties of any profession licensed or regulated by this chapter;[⁹]

(6) Violation of, or assisting or enabling any person to violate, any provision of this chapter, or any lawful rule or regulation adopted pursuant to this chapter;

* * *

(13) Violation of any professional trust or confidence;

* * *

(15) Violation of the drug laws or rules and regulations of this state, any other state or the federal government;

* * *

(20) Being unable to practice as a dentist, specialist or hygienist with reasonable skill and safety to patients by reasons of professional incompetency, or because of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or as a result of any mental or physical condition. In enforcing this subdivision the board shall, after a hearing before the board, upon a finding of probable cause, require the dentist or specialist or hygienist to submit to a reexamination for the purpose of establishing his or her competency to practice as a dentist, specialist or hygienist, which reexamination shall be conducted in accordance with rules adopted for this purpose by the board, including rules to allow the examination of the dentist's, specialist's or hygienist's professional competence by at least three dentists or fellow specialists, or to submit to a mental or physical examination or combination thereof by at least three physicians. One examiner shall be selected by the dentist, specialist or hygienist compelled to take examination, one selected by the board, and one shall be selected by the two examiners so selected. Notice of the physical or mental examination shall be given by personal service or registered mail. Failure of the dentist, specialist or hygienist to submit to the examination when directed shall constitute an admission of the

⁹ We have reproduced paragraph (5) as it appears both in the statute itself and in the Board's complaint in cause number 11-2156 DB. However, the Board omitted the language, "or relating to one's ability to perform, the functions or duties of," from its complaint in cause number 10-0498 DB. We discuss this omission under "The Board's wording of § 332.321.2(5) in its two complaints" below.

allegations against him or her, unless the failure was due to circumstances beyond his or her control. A dentist, specialist or hygienist whose right to practice has been affected pursuant to this subdivision shall, at reasonable intervals, be afforded an opportunity to demonstrate that he or she can resume competent practice with reasonable skill and safety to patients.

Evidentiary Issues

Board's Exhibit B-41

The Board's Exhibit B-41 (sometimes referred to in the transcript as Exhibit 41) is a copy of an email exchange between Joseph W. Sears, an investigator for the Board, and Dan Stevenson, a Web administrator for the Division of Professional Registration. Page 2 of the Exhibit is a copy of an email from Sears to Stevenson, asking for a copy of the exact wording of the online 2008 dental specialty license renewal application. Page 1 of the exhibit, from Stevenson to Sears, is a copy of an email setting out what the online form said. The Board presented no witness, business record affidavit, or other support for the exhibit. Dr. Glassman objected to the first page of the exhibit as hearsay. We sustain the objection.

Dr. Glassman's Exhibit 3

Dr. Glassman's Exhibit 3 is a copy of portions of the closed minutes of the Board for its telephone conference calls of September 1, 2010, February 23, 2011, and June 8, 2011, and of the Board's meeting of April 14-16, 2011. The portions all concern the Board's actions or discussions concerning Dr. Glassman. The Board objected on grounds of relevance, but we overrule the objection.

Dr. Glassman's Exhibits 4-7

Exhibits 4 through 7 are affidavits executed by, respectively, Kim Wolfrum, Carrie French, Vickie Spore, and Beth Bithn. Dr. Glassman served the affidavits of French, Wolfrum, and Spore on the Board on March 16, 2012, and served Diehn's affidavit on March 19, 2012, all

more than seven days before the date of the hearing on April 5, 2012. The Board objected at the hearing, but not before, to their admission on grounds of hearsay (all), double hearsay (Wolfrum), and speculation (French and Bithn).

Our treatment of the affidavits is governed by § 536.070(12), which provides:

Any party or the agency desiring to introduce an affidavit in evidence at a hearing in a contested case may serve on all other parties (including, in a proper case, the agency) copies of such affidavit in the manner hereinafter provided, at any time before the hearing, or at such later time as may be stipulated. *Not later than seven days after such service, or at such later time as may be stipulated, any other party (or, in a proper case, the agency) may serve on the party or the agency who served such affidavit an objection to the use of the affidavit or some designated portion or portions thereof on the ground that it is in the form of an affidavit;* provided, however, that if such affidavit shall have been served less than eight days before the hearing such objection may be served at any time before the hearing or may be made orally at the hearing. If such objection is so served, the affidavit or the part thereof to which objection was made, may not be used except in ways that would have been permissible in the absence of this subdivision; provided, however, that such objection may be waived by the party or the agency making the same. *Failure to serve an objection as aforesaid, based on the ground aforesaid, shall constitute a waiver of all objections to the introduction of such affidavit, or of the parts thereof with respect to which no such objection was so served, on the ground that it is in the form of an affidavit, or that it constitutes or contains hearsay evidence, or that it is not, or contains matters which are not, the best evidence, but any and all other objections may be made at the hearing.* Nothing herein contained shall prevent the cross-examination of the affiant if he or she is present in obedience to a subpoena or otherwise and if he or she is present, he or she may be called for cross-examination during the case of the party who introduced the affidavit in evidence. If the affidavit is admissible in part only it shall be admitted as to such part, without the necessity of preparing a new affidavit. The manner of service of such affidavit and of such objection shall be by delivering or mailing copies thereof to the attorneys of record of the parties being served, if any, otherwise, to such parties, and service shall be deemed complete upon mailing; provided, however, that when the parties are so numerous as to make service of copies of the affidavit on all of them unduly onerous, the agency may make an order specifying on what parties service of copies of such affidavit shall be made, and

in that case a copy of such affidavit shall be filed with the agency and kept available for inspection and copying. Nothing in this subdivision shall prevent any use of affidavits that would be proper in the absence of this subdivision.

(Emphasis added.) The Board did not object to the admission of the affidavits until the hearing; therefore, by the express terms of the statute, it waived its hearsay (including double hearsay) objections as to all four.

Regarding the Board's objection to the French affidavit (Exhibit 5) on grounds of speculation regarding the fitting of the retainer to A.B., the portions of French's affidavit pertaining to the fitting of the retainer to A.B. state as follows:

3. Dr. Glassman's procedure at the end of a patient's treatment is to confirm the correct positioning of the teeth by x-rays; deband the patient; fit the patient with a positioner while the retainer is fabricated, usually a week to 10 days; then to confirm that the retainer fits properly at the time of delivery to the patient.
4. I was present at the retainer fitting and delivery to Dr. Glassman's patient [child]. Dr. Glassman fitted [child] with an Essix retainer. Essix retainers are vacuum formed and fitted to occupy the space between the patient's teeth.
5. It is apparent at the time of fitting if an Essix retainer fits properly.
6. Dr. Glassman sends back retainers that do not fit the patient properly at the time of delivery.
7. [Child]'s Essix retainer fit properly when Dr. Glassman delivered it to [him/her]."

French's affidavit also states she is a certified orthodontic assistant and had worked for Dr. Glassman from 1997 until 2004, and then from 2009 until 2013. While neither party discussed the importance, if any, of French's being a certified orthodontic assistant, the detail with which French described the specifics of fitting a retainer and the retainer's proper fit makes her sufficiently credible in our opinion to allay any fears we might have that she was merely

speculating as to how the retainer fit A.B.'s mouth. Her ten-plus years' experience working for Dr. Glassman makes her statements concerning Dr. Glassman's procedures sufficiently credible for us to overrule the Board's objection.

Dr. Glassman's Motion to Strike

After the hearing, Dr. Glassman moved to strike five of the seven lines contained in a chart the Board included in its proposed findings of fact¹⁰ on the ground that there was no support in the record for them. In response, the Board agreed that "additional evidence on lines 1, 3, 5, and 7 of the table...was not admitted," but argued that a letter from BNDD's administrator, Susan McCann, to Dr. Glassman¹¹ established that any prescriptions written from June 2007 until at least February 12, 2008, were written in violation of state and federal drug laws. While the letter does say that (and Dr. Glassman did not object to admission of the letter on hearsay or other grounds), we disagree that it establishes any such violations sufficiently to satisfy the evidentiary requirements for disciplining Dr. Glassman's license.

The Board also asserted that Dr. Glassman's testimony establishes that on January 9, 2008, he wrote a prescription for hydrocodone for patient S.B., and on January 21, 2008, he wrote a prescription for hydrocodone for patient W.B. We agree with the Board's last assertion and have found accordingly.

Regarding our authority to strike, we note that we are directed by law to exclude irrelevant or unduly repetitious evidence in proceedings before us.¹² The Board's chart is not evidence, but instead is a summary of other, purported evidence. We found no evidence in the record to support the other five instances (the ones other than January 9 and January 21, 2008)

¹⁰ Board's proposed findings of fact and conclusions of law p. 8. The chart sets out seven occasions between November 11, 2007 and February 4, 2008 when Dr. Glassman allegedly wrote prescriptions for controlled substances.

¹¹ Ex. E-1.

¹² Section 536.070(8).

when Dr. Glassman allegedly wrote these prescriptions.¹³ Rather than striking the five lines in the chart, as Dr. Glassman requested, we reject this portion of the Board’s legal argument.

The Board’s wording of § 332.321.2(5) in its two complaints

Section 332.321.2(5) creates grounds for discipline for a dentist’s “incompetency, misconduct, gross negligence...in the performance of, *or relating to [the dentist’s] ability to perform*, the functions or duties of [a dentist].” (Emphasis added.) The language “relating to” creates a low threshold; to *relate* is merely to have a logical connection.¹⁴

However, as we noted when we stated the language of § 332.321.2 above, the Board omitted the clause, *or relating to the dentist’s ability to perform*, from its complaint in case number 10-0498 DB. That language was omitted from the reproductions of the relevant portions of § 332.321.2,¹⁵ the allegation that Dr. Glassman’s conduct constituted incompetency, misconduct, or gross negligence with regard to Count I (the BAC Incident),¹⁶ and the allegation that Dr. Glassman’s conduct constituted incompetency, misconduct, or gross negligence with regard to Count III (the BNDD violation).¹⁷ Then, in its complaint in case number 11-2156 DB, the Board included the clause as part of § 332.321.2(5).¹⁸ We can find cause for discipline only on the law cited in the complaint.¹⁹ Therefore, for each count, we apply the statute as the Board cited it in the complaint.

¹³ See *Ozark Appraisal Service, Inc. v. Neale*, 67 S.W.3d 759, 766-67 (Mo. App., S.D. 2002) (Summaries of records admissible only to the extent of competency of underlying records).

¹⁴ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1050 (11th ed. 2004).

¹⁵ Complaint, 10-0498 DB, ¶¶ 18, 45.

¹⁶ *Id.* ¶ 14 (“Licensee’s conduct as alleged herein, constitutes incompetency, misconduct and/or gross negligence in the performance in the functions or duties of a licensed dentist in violation of section 332.321.2(5) RSMo.”)

¹⁷ *Id.* ¶ 41.

¹⁸ Complaint, 11-2156 DB, ¶ 7.

¹⁹ *Sander v. Missouri Real Estate Comm’n*, 710 S.W.2d 896, 901 (Mo. App., E.D. 1986).

Count I- The BAC Incident

The Board's complaint alleges that Dr. Glassman's license is subject to discipline under § 332.321.2(1), (5), (13), (15), and (20) for the events surrounding his arrest, *Alford* plea, conviction, and suspended execution of sentence for excessive BAC. Before we address whether those grounds for discipline apply, we set out below how the parties have presented the facts and how we, accordingly, base our findings of fact.

The parties' competing narratives

The Board's version of the facts is: In an intoxicated state, Dr. Glassman drove to his office on December 17, 2007, intending to treat patients when he arrived. The fact that he intended to treat patients was evidenced by the fact that several patients had been seated in dental chairs in his office, the wires of their braces untied, awaiting him, and that he made it as far as the parking lot of his office before he was stopped and arrested by a police officer.

Dr. Glassman's version of the facts differs substantially. According to Dr. Glassman, before arriving in his office parking lot, he called his staff, informed them he was sick, and told them to cancel his appointments.²⁰ This allegation, if true, negates (or at least challenges) the Board's allegation that Dr. Glassman intended to treat patients when he got to his office. Further, according to Spore, the office manager, the staff did not learn of Dr. Glassman's call until later: instead of talking to a staff member, he left a message on the office's answering machine, instructing the staff to cancel his appointments.²¹

Dr. Glassman contends that, because the staff had not retrieved his message by the time he arrived at his parking lot, they were unaware he had instructed them to cancel his appointments. Consequently, when they saw Dr. Glassman in the parking lot, they seated his

²⁰ Tr. 32.

²¹ Affidavit of Vikki Spore, Respondent's Exhibit 6, ¶ 7.

patients in dental chairs and untied their wires.²² Later, when they realized Dr. Glassman was not coming in for work, they retied the patients' wires and sent them home.²³ When someone on staff eventually checked the answering machine, they followed Dr. Glassman's instructions and canceled his appointments for the rest of the day.²⁴ These allegations, if true, would explain why Dr. Glassman's staff had prepared his patients to be seen by him, even though he had done all he reasonably could to cancel the day's appointments.

The Board argued that the record "clearly supports a finding that [Dr. Glassman] arrived at work...without having arranged to reschedule patients," citing Spore's affidavit to the effect that Dr. Glassman's staff's actions in seating patients and untying their wires was proof that Dr. Glassman had not rescheduled patients. The Board also argued that Spore's affidavit "does not indicate that [Dr. Glassman] took any steps to cancel patient appointments."²⁵ However, the Board's argument ignores Dr. Glassman's testimony and Spore's affidavit to the contrary. That evidence supports every aspect of Dr. Glassman's narrative.

To be sure, Dr. Glassman's testimony and Spore's affidavit neatly support Dr. Glassman's version—but it requires us to accept certain conclusions that do not bear scrutiny. First, we must accept that Dr. Glassman was driving to his office, but not intending to see patients when he got there. This is the conclusion that must be reached, given that Dr. Glassman, while purportedly too sick to see patients (and hence instructing his staff to cancel their appointments), drove all the way to his office anyway. Second, we must accept that not only did Dr. Glassman call the office while driving there, but that the staff did not answer his call or retrieve Dr. Glassman's message until later that day.

²² Affidavit of Vikki Spore, Respondent's Exhibit 6, ¶ 4.

²³ *Id.* ¶ 6.

²⁴ *Id.* ¶ 7.

²⁵ Board Reply Brief p. 3.

The first conclusion, if true, negates or at least challenges the Board's accusation that he drove to the office in an intoxicated condition, intending to see patients. The second conclusion, if true, negates or at least challenges the Board's accusation regarding Dr. Glassman's intent to see patients that day.

Finally, Dr. Glassman's version requires we accept that when one or more staff members looked out to the parking lot, whoever saw Dr. Glassman did not, at least at first, see him being arrested or otherwise engaged with the arresting officer, and learned of his arrest only after seating the patients and untying their wires. Dr. Glassman made no attempt to construct a timeline in which these events might fit, and we are not obligated to construct one for him.

We are mindful that it is the Board, not Dr. Glassman, that has the burden to prove its case by a preponderance of the evidence. A "preponderance of the evidence" is evidence showing, as a whole, that "the fact to be proved is more probable than not."²⁶ In weighing the two very different narratives argued here, we must consider which is supported by a preponderance of the evidence and the inferences reasonably drawn from such evidence.

After having fully considered and weighed the evidence, we conclude that Dr. Glassman intended to go to his office on December 17, 2007, and intended to practice dentistry when he got there. These facts are relevant to our analysis below of whether Dr. Glassman committed misconduct or violated a professional trust or confidence.

Alford plea and use of conviction to prove underlying conduct

The Board argues that Dr. Glassman's guilty plea on June 3, 2008 to excessive BAC, as set out in § 577.012,²⁷ constitutes cause for discipline as we set out above. At the time of the incident, § 577.012 provided:

²⁶ *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000).

²⁷ RSMo Supp. 2006.

1. A person commits the crime of “driving with excessive blood alcohol content” if such person operates a motor vehicle in this state with eight-hundredths of one percent or more by weight of alcohol in such person's blood.
2. As used in this section, percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred milliliters of blood or two hundred ten liters of breath and may be shown by chemical analysis of the person's blood, breath, saliva or urine. For the purposes of determining the alcoholic content of a person's blood under this section, the test shall be conducted in accordance with the provisions of sections 577.020 to 577.041.
3. For the first offense, driving with excessive blood alcohol content is a class B misdemeanor.

However, Dr. Glassman entered an *Alford* plea to the charge. In an *Alford* plea, a defendant enters a plea of guilty, waives trial, and consents to punishment *without admitting guilt*.²⁸ The Board cites no authority in support of its argument that a judgment of conviction, by itself, constitutes proof that the convicted defendant committed the underlying conduct.²⁹ Therefore, we disagree with the Board’s argument regarding grounds for discipline arising from the conviction itself. Nonetheless, Dr. Glassman admitted at the hearing to being intoxicated with alcohol when he arrived at his office on December 17, 2007.³⁰ It is that admission, not the conviction for excessive BAC, that we consider in determining whether cause exists for disciplining Dr. Glassman’s license for events and behavior arising from his actions of December 17, 2007.

²⁸ *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

²⁹ This issue is entirely different from one where a convicted defendant seeks to introduce evidence in a subsequent proceeding that (s)he did not do one of the things constituting an element of the criminal offense of which (s)he was convicted. That is the issue of offensive collateral estoppel, in which such a defendant is precluded from introducing such contradictory evidence by the fact of the criminal conviction. *Carr v. Holt*, 134 S.W.3d 647, 649-50 (Mo. App., E.D. 2004). Had Glassman simply pled guilty to the charge instead of entering an *Alford* plea, his guilty plea would constitute a judicial admission of the facts charged, but such a result does not arise from the fact of the conviction itself. *Sullivan v. Spears*, 871 S.W.2d 75, 76 n.1 (Mo. App., W.D. 1994); *see also Lewis v. Wahl*, 842 S.W.2d 82, 95 n.5 (Mo. banc 1992) (Thomas, J. concurring).

³⁰ Tr. 32, lines 15-20.

Section 332.321.2(1) - Impairment

The Board's complaint alleges Dr. Glassman consumed alcohol to such an extent that such use impaired his ability to perform the work of a dentist. In its proposed conclusions of law, the Board argues that "[Dr. Glassman's] plea of guilty on June 3, 2008 to excessive BAC provides cause for discipline pursuant to §§ 332.321.2(1) and 332.321.2(20)." The Board followed this statement with its version of the facts.³¹ Dr. Glassman argues that the Board had waived this allegation. An allegation is not waived if evidence is presented to support it. Even so, the Board addressed this allegation in its post-hearing briefs.

Dr. Glassman also argued that the Board "offer[ed] no additional level of impairment beyond an alcohol level above the legal limit for operating a motor vehicle."³² We disagree. Dr. Glassman admitted at the hearing that he was intoxicated due to alcohol at the day and time of his arrest.³³ "'Intoxication' is a 'physical condition' usually evidenced by unsteadiness on the feet, slurring of speech, lack of body coordination *and an impairment of motor reflexes*."³⁴ (Emphasis added.) Furthermore, while the Board presented no further evidence (such as, for instance, a probable cause statement of the arresting officer or a charging document) about the specifics of Dr. Glassman's actions resulting in his arrest, we have no trouble finding, as fact, that the Board presented sufficient circumstantial evidence of Dr. Glassman's intoxication to justify a conclusion that he was impaired.

Furthermore, while Dr. Glassman argued there was no evidence that he was impaired enough to perform dentistry on the day in question, that is not a requirement of § 332.321.2(1). Paragraph (1) does not require a dentist to be drunkenly impaired while actually performing

³¹ See "The parties' competing narratives" above.

³² Glassman brief p. 6.

³³ Tr. 32, 15-20.

³⁴ *State v. Hall*, 201 S.W.3d 599, 603 (Mo. App., S.D. 2006) (emphasis added), *quoting State v. Teaster*, 962 S.W.2d 429, 431 (Mo. App., S.D. 1998).

dentistry, but only be intoxicated to an extent that his or her alcohol use impairs *his ability* to perform the work of a dentist.

Two cases from the Western District Court of Appeals support our conclusion. In *Koetting v. State Bd. of Nursing*, Koetting’s drunkenness did not impair her from working as a nurse; instead, the court held that it impaired her from attending work at all, and thus created grounds for disciplining her license.³⁵ The court held this interpretation of the statute furthers the stated goal of professional licensing statutes—to protect the public.³⁶

Koetting was cited by the court in *Merwin v. State Bd. of Registration for Healing Arts*, where this Commission concluded (and the court agreed) that a physician’s alcohol-induced absence from work showed impairment for purposes of the physician licensing disciplinary statute.³⁷ Like Dr. Glassman does here, Dr. Merwin argued there was no evidence that he was impaired in performing his profession—but as we respond here, the court responded that this was not the test imposed by the legislature. Instead, the test is whether his ability to perform the work of his profession is impaired.³⁸

Accordingly, we conclude Dr. Glassman’s admission of intoxication on December 17, 2007, coupled with our finding that he intended to practice dentistry upon arrival at his office, constitutes sufficient proof that he used alcohol on that day to an extent that it impaired his ability to perform the work of a dentist. We find cause for discipline under § 332.321.2(1).

Section 332.321.2(5) – Incompetency, misconduct, gross negligence,
fraud, misrepresentation, and dishonesty

Dr. Glassman argued in his brief that the Board waived its allegations of incompetency and gross negligence by its failure to raise them in its proposed conclusions of law. Because

³⁵ 314 S.W.3d 812, 816 (Mo. App., W.D. 2010).

³⁶ *Id.* at 819.

³⁷ 399 S.W.3d 110, 111-12 (Mo. App., W.D. 2013).

³⁸ *Id.* at 114.

parties are not required to submit post-hearing briefs or other advocacy materials, we will not penalize a party for failure to include all of its arguments in such materials, particularly when evidence was received at the hearing to support its allegations. Therefore, we consider the grounds for discipline raised in the complaint for which evidence was adduced.

Incompetency

Incompetency is a general lack of, or a lack of disposition to use, a professional ability.³⁹ We follow the analysis of incompetency in a disciplinary case from the Supreme Court, *Albanna v. State Bd. of Reg'n for the Healing Arts*.⁴⁰ Incompetency is a “state of being.”⁴¹ The disciplinary statute does not state that licensees may be subject to discipline for “incompetent” acts, but for “incompetence.” In this case, the Board proved only one act of intoxication, which is not consistent with a state of being. Furthermore, as we set out above, the allegedly incompetent act (driving while intoxicated) had nothing to do with performing the functions or duties of a dentist. Therefore, we find no cause for discipline for incompetency.

Misconduct

Misconduct is the intentional commission of a wrongful act.⁴² We may infer the requisite mental state from the conduct of the licensee “in light of all surrounding circumstances.”⁴³ Direct evidence of intent is rarely susceptible to direct proof and, therefore, must generally be established by circumstantial evidence.⁴⁴

In this case, we agree that Dr. Glassman intentionally committed a wrongful act. However, the statute as cited by the Board requires that the wrongful act be committed in the

³⁹ *Johnson v. Missouri Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 642 (Mo. App., W.D. 2004); *Forbes v. Missouri Real Estate Comm'n*, 798 S.W.2d 227, 230 (Mo. App., W.D. 1990).

⁴⁰ 293 S.W.3d 423 (Mo. banc 2009)

⁴¹ *Id.* at 435.

⁴² *Grace v. Missouri Gaming Comm'n*, 51 S.W.3d 891, 900 (Mo. App. W.D. 2001).

⁴³ *Duncan v. Missouri Bd. for Architects, Prof'l Engrs. & Land Surveyors*, 744 S.W.2d 524, 533 (Mo. App., E.D. 1988).

⁴⁴ *State v. Agee*, 37 S.W.3d 834, 837 (Mo. App., S.D. 2001).

performance of the functions or duties of a dentist. Keeping appointments to see patients is certainly a duty of a dentist; driving a motor vehicle in an intoxicated state to see patients, with the intention of providing dental services while impaired, is inarguably an act of misconduct in the performance of one's professional duties. We find cause for discipline for misconduct.

Gross negligence

Gross negligence is an act or course of conduct that demonstrates a conscious indifference to a professional duty that constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.⁴⁵ Just as with our discussion of misconduct above, § 332.321.2(5), as cited by the Board, requires we find cause for discipline if Dr. Glassman's actions constituted gross negligence in the performance of the functions and duties of a dentist. As with the misconduct allegation, Dr. Glassman was performing such functions or duties when he drove to work while intoxicated, with the intention of performing dentistry upon his arrival. Therefore, we find cause for discipline for gross negligence.

Fraud, Misrepresentation, and Dishonesty

Fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him.⁴⁶ It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive.⁴⁷ Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit.⁴⁸

The Board points to no such intentional perversion of truth, lack of integrity, disposition to deceive, or a falsehood or untruth made with the intent and purpose of deceit, and we find

⁴⁵ *Tendai v. Missouri State Bd. of Reg'n for the Healing Arts*, 161 S.W.3d 358, 367 (Mo. banc 2005), overruled on other grounds by *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423 (Mo. banc 2009).

⁴⁶ *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910).

⁴⁷ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

⁴⁸ *Id.* at 794.

none in the record. Therefore, we find no grounds for discipline for fraud, misrepresentation, or dishonesty.

In summary, we find cause for disciplining Dr. Glassman's license under § 332.321.2(5) for misconduct and gross negligence.

Section 332.321.2(13) - Professional trust or confidence

The Board argues Dr. Glassman's conduct constituted a violation of professional trust or confidence. The Board alleges in the complaint, and argues in its proposed conclusions of law, that patients relied on Dr. Glassman's professional expertise to ensure that he was able to practice as a dentist with reasonable skill and safety and free from drugs or alcohol, and that his behavior violated that trust.

Dr. Glassman misstated that argument in his brief, arguing that the Board presented no evidence showing "that patients expect dentists to keep appointments without exception and without regard to the dentist's personal condition." The alleged breach of professional trust or confidence at issue here is not one of keeping appointments, but of practicing (or intending to practice) dentistry while drunk. As we set out above, Dr. Glassman did not practice dentistry while drunk, but he went to his office on December 17, 2007 with the intent to do so.

"Professional" is

of, relating to, or characteristic of a profession or calling...[;]...
engaged in one of the learned professions or in an occupation
requiring a high level of training and proficiency...[;
and]...characterized or conforming to the technical or ethical
standards of a profession or an occupation....⁴⁹

"Trust" is "assured reliance on some person or thing [;] a confident dependence on the character, ability, strength, or truth of someone or something...[.]"⁵⁰ "Confidence" is a synonym for

⁴⁹ WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 1811 (1986).

⁵⁰ *Id.* at 2456.

“trust.”⁵¹ Trust “implies an assured attitude toward another which may rest on blended evidence of experience and more subjective grounds such as knowledge, affection, admiration, respect, or reverence[.]”⁵² Confidence “may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the subjective[.]”⁵³ In short, professional trust or confidence is the reliance on the special knowledge and skills evidenced by professional licensure. Dr. Glassman’s staff and patients relied on his professional judgment—to know his abilities and limitations, and to understand how impairment of his faculties affects his performance.

Whether his impairment was caused by a bout of influenza, the measles, or intoxication, Dr. Glassman was reasonably expected to exercise his professional judgment to correctly decide whether he was fit to perform as a dentist. In traveling to his office in an intoxicated condition, with the intent on performing dental procedures on his patients, Dr. Glassman violated the professional trust owed his staff and patients. We find cause to discipline Dr. Glassman’s license under § 332.321.2(13).

Section 332.321.2(20) - Drunkenness

Dr. Glassman’s admission of intoxication, as we set out under “Section 332.321.2(1)- Impairment” above, is relevant to whether cause for discipline exists under paragraph (20), as it creates cause for discipline when a dentist is unable to practice as a dentist because of drunkenness. However, paragraph (20) also sets out a procedure for its enforcement by which the Board must conduct a probable cause hearing to determine whether a licensee should be required to submit to re-examination to establish his or her competence to practice. If the

⁵¹ *Id.* at 475 and 2456.

⁵² *Id.* at 2456.

⁵³ *Id.* at 475.

licensee fails to submit to the examination when directed to do so by the Board, he or she may be deemed to have admitted the allegations.

In this case, however, the Board failed to show that it provided Dr. Glassman such a probable cause hearing, or that it required him to submit to a re-examination to establish his competence to practice and failed to do so. Instead, we are asked to make a finding that he is subject to discipline under this statute without paying heed to the entirety of the statute. As the Supreme Court instructs, “every word, clause, sentence, and provision of a statute must have effect.”⁵⁴ We cannot ignore the procedures established in paragraph (20). Because the Board ignored them, we find no cause for discipline under § 332.321.2(20).

Summary – grounds for discipline under Count I

In summary, Dr. Glassman’s license is subject to discipline under § 332.321.2(1), (5) and (13), but not under § 332.321.2(20) for this count.

Count II- Renewal Application

The Board alleges Dr. Glassman’s license is subject to discipline under § 332.321.2(5) and (13) because he misrepresented the fact of his conviction for excessive BAC on his specialty dental license renewal form. That form purportedly required him to affirm, if true, that he had not been convicted of a traffic offense resulting from or related to the use of alcohol; and, the Board alleges, he made such an affirmation, and the affirmation was false. However, as we set out under the subheading “Board’s Exhibit B-41” above, we excluded as hearsay the only objective evidence presented of what the form said.

As to what Dr. Glassman’s answer was to the question regarding his BAC conviction, instead of objective evidence (such as a copy of the application form or, better still, Dr. Glassman’s completed form), the Board attempted to prove the answer by asking Dr. Glassman

⁵⁴ *Saint Charles County v. Director of Revenue*, 407 S.W.3d 576, 578 (Mo. banc 2013).

at the hearing how he answered it. We reproduce the portion of the transcript⁵⁵ the Board claims supports its assertion:

Q (MS. CROW HALCOMB): On your application for renewal, there was no indication that you had pled guilty to the excessive BAC in 2008; is that correct?

MR. SCHWARZ: Objection. Again, asked and answered.

COMMISSIONER NELSON: I'm not sure if that part had fully been answered. I'll hear from the witness on that.

GLASSMAN: Well, to my knowledge, no. That's because I received a letter from the Dental Board stating that that had not been filled out. I had never seen it.

The Board did not object to Dr. Glassman's answer as being non-responsive, nor on any other ground, nor did it try to get Dr. Glassman to clarify his answer. However, while the Board apparently considers Dr. Glassman's testimony to be an admission that his application failed to acknowledge his guilty plea, we find the testimony ambiguous at best.

The Board's question, "On your application for renewal, there was no indication that you had pled guilty to the excessive BAC in 2008; is that correct?", is most grammatically and contextually interpreted as asking whether it was correct that there was *no* indication on the application that Dr. Glassman had pled guilty. A "no" answer to that question, i.e., it was *not* correct that there was no such indication, is certainly not the admission the Board sought. Dr. Glassman's next statement, "That's because I received a letter from the Dental Board stating that that had not been filled out. I had never seen it[,]” however, suggests an acknowledgement that he was aware an incomplete renewal application had been submitted to the Board.

Even if this evidence establishes Dr. Glassman, or someone on his behalf, submitted a renewal application that was incomplete, we must determine whether the omission was a

⁵⁵ In the first portion, the Board's attorney asked Glassman if he understood his obligation to report the excessive BAC conviction on the renewal application, and he responded that he did. Tr. 32, lines 21-25.

“misrepresentation” for purposes of § 332.321.2(5) and (13). A misrepresentation is a falsehood or untruth made with the intent and purpose of deceit.⁵⁶ While we reject Dr. Glassman’s argument that he can escape liability for misstatements on his renewal application because his office manager completed and filed the application without his seeing it, we must also reject the Board’s argument for discipline as without support.

The Board presented no evidence that Dr. Glassman intentionally omitted his BAC conviction from his renewal application with the intent and purpose of deceiving the Board. While we may infer the requisite mental state from the conduct of the licensee “in light of all surrounding circumstances,”⁵⁷ we know too little of the surrounding circumstances here to conclude that Dr. Glassman’s omission was intentional. This is particularly true if he did not review his renewal application before it was submitted, as Dr. Glassman claims.

The Board failed to meet its burden of proof that Dr. Glassman misrepresented his BAC conviction on his dental specialty renewal application. Therefore, we conclude there is no cause for disciplining Dr. Glassman’s license under § 332.321.2(5) or (13) for this count.

Count III- BNDD Violation

Unpleaded grounds for discipline

The Board’s complaint alleges Dr. Glassman’s license is subject to discipline under § 332.321.2(5), (13), and (15) for his violations of state and federal law. Its proposed conclusions of law, however, argues these violations constitute cause for discipline under § 332.321.2(5), (6), and (15). Because paragraph (6) was not pleaded in the Board’s complaint, we will not consider it, because we cannot find discipline for uncharged conduct.⁵⁸

⁵⁶ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 794 (11th ed. 2004).

⁵⁷ *Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm’n Nov. 15, 1985) at 125, aff’d, 744 S.W.2d 524, 533 (Mo. App., E.D. 1988).

⁵⁸ *Dental Bd. v. Cohen*, 867 S.W.2d 295, 297 (Mo. App., W.D. 1993).

What does the Board allege against Dr. Glassman?

The Board's fact allegations evolved into the following:

- The BNDD registration issued to Dr. Glassman in 2004 listed the Schultz Road address;
- Dr. Glassman maintained an administrative office, not a practice facility, at the Schultz Road address;
- The 2004 registration expired on June 30, 2007;
- Dr. Glassman wrote seven controlled substance prescriptions during the period June 30, 2007 to February 4, 2008, in other words, after the 2004 registration expired;
- BNDD issued a registration to Dr. Glassman on February 4, 2008. That registration showed the S. Fifth St. address as the practice address;
- Dr. Glassman did not practice dentistry or see patients at the S. Fifth St. address;
- Dr. Glassman had a relationship of trust and confidence with his patients that he would follow all controlled substance laws and regulations; and
- BNDD's administrator wrote Dr. Glassman a letter on [date], stating that "any activities that you may have conducted with controlled substances at any time your billing address was used as your practice address until February 22, 2008 would have been in violation of state and federal law." The letter also quotes 19 CSR 30-1.019(2).

From these allegations, the Board alleges cause for discipline under all six grounds of § 332.321.2(5), for violation of the trust and confidence of his patients, and for violating a drug law.

As we state above under "Dr. Glassman's motion to strike," Dr. Glassman moved to strike five of the seven instances where he allegedly prescribed controlled substances during the period when his registration had lapsed.⁵⁹ He also pointed out that, until he received the February 25 letter from BNDD, he and his staff believed that they were doing nothing wrong by showing the practice's administrative address as the address on the registration, and based that belief on the fact that they had been applying for BNDD registrations for 28 years and this was the first time the issue had been raised.

The applicable and the cited (and uncited) law

While the Board asserts "violations of state and federal drug laws," it cites only one such law, 19 CSR 30-1.019(2), which provides:

⁵⁹ We treated the motion to strike the five instances as an objection, and sustained the objection.

A controlled substance registration shall be issued to an individual practitioner at a Missouri practice location where controlled substance and other patient care activities occur.

The Board appears to read the regulation as forbidding Dr. Glassman from conducting controlled substance activities at a location other than the one listed on his registration. And in fact, it can be read that way in the context of other regulations found in 19 CSR 30, chapter 1.⁶⁰ Specifically, 19 CSR 30-1.023(2)(A)5A provides:

The registration of any person shall terminate –

* * *

5. If and when the person discontinues business or changes business location, except

A. The registration shall not terminate for thirty (30) days from the effective date of the change if the person applies for a new registration or modification within the thirty (30)-day period[.]

Also, 19 CSR 30-1.026(3) provides in relevant part:

A separate registration is required for each principal place of business or professional practice at one general physical location where controlled substances are manufactured, distributed or dispensed by a person.

Reading 19 CSR 30-1.019(2) in that context, we agree with the Board that Dr. Glassman's license is subject to discipline for all prescriptions he wrote at locations other than the one shown on his 2004-07 BNDD registration. However, the Board failed to establish that Dr. Glassman wrote *any* prescriptions during that time. While it is extremely doubtful that he did *not* write any prescriptions during the period of June 8, 2004 to June 30, 2007, the Board still

⁶⁰ See *Department of Soc. Servs., Div. of Med. Servs. v. Senior Citizens Nursing Home Dist.*, 224 S.W.3d 1, 9 (Mo. App., W.D. 2007) (Regulations are interpreted by their plain and ordinary meaning, and context can determine meaning).

has the burden to prove *facts* on which it may discipline Dr. Glassman.⁶¹ It put forward no such facts, and Dr. Glassman did not admit any.

The Board did establish that Dr. Glassman had been using the wrong address for his registration at least since June 8, 2004; and, by Dr. Glassman's admission at the hearing, he had done so for many years before then. We consider below whether this constitutes cause for discipline.

The Board also appears to read the regulation as forbidding Dr. Glassman from writing controlled substance prescriptions during a period when he did not possess an active registration. While such a law makes sense (why require practitioners to obtain a BNDD registration if issuing prescriptions without having one is not illegal?), no amount of contextual interpretation can turn 19 CSR 30-1.019(2) into a ban on writing controlled substance prescriptions during the period when a registration has expired.

In fact, there is no need to do so, because a statute does exactly that. Section 195.030.2 provides in relevant part:

No person shall...prescribe any controlled substance...without having first obtained a registration issued by the department of health in accordance with rules and regulations promulgated by it.⁶²

Dr. Glassman violated this law; however, the Board failed to cite it. That failure, however, only affects § 332.321.2(15); we still consider Dr. Glassman's underlying behavior of writing prescriptions during a time when his registration had expired as a potential ground for discipline.

⁶¹*Berger*, 764 S.W.2d at 711.

⁶²RSMo 2000.

Section 332.321.2(5) – Incompetency, misconduct, gross negligence,
fraud, misrepresentation, or dishonesty

The Board’s complaint specifically alleges Dr. Glassman’s conduct regarding this count constituted incompetency, misconduct, and/or gross negligence in the performance of the functions or duties of a dentist. The Board also recited the other three grounds for discipline under paragraph (5) (fraud, misrepresentation, dishonesty), so we consider them as well.

Incompetency

As we stated under Count I above, incompetency is a general lack of, or a lack of disposition to use, a professional ability. Also, incompetency is a state of being; therefore, licensees are only subject to discipline for multiple acts of incompetency. In this case, Dr. Glassman’s issuance of two controlled substance prescriptions during the period when his BNDD registration had expired, and his obtaining BNDD registrations for his administrative addresses, not his practice address(es), at least nominally fulfill the “multiple acts” requirement.

As to whether these actions constitute incompetency, we look to the Supreme Court’s opinions in *Albanna*⁶³ and *Tendai v. Missouri Bd. of Registration for Healing Arts*⁶⁴ for guidance. In *Albanna*, the Board of Healing Arts alleged, and this Commission agreed, that Dr. Albanna’s treatment of a work injury by complex surgery⁶⁵ both violated the standard of care and constituted incompetency. The Supreme Court reversed the finding of incompetency, drawing a clear line distinguishing negligence, even gross negligence, and incompetency.⁶⁶

⁶³ 293 S.W.3d at 435.

⁶⁴ 161 S.W.3d 358, 369-70 (Mo. banc 2005), *overruled on other grounds by Albanna*, 293 S.W.3d at 428.

⁶⁵ The surgery involved creating and filling bone cages to fuse the patients’ vertebrae. One of the substances used to fill the cages was approved for use in bone fractures, but not for surgical fusions. *Albanna*, 293 S.W.3d at 426.

⁶⁶ *Id.* at 436.

In *Tendai*, the Board of Healing Arts alleged, and this Commission agreed, that Dr. Tendai's failure to conduct an amniocentesis or non-stress testing on a fetus,⁶⁷ and his failure to refer the fetus' mother to a perinatologist,⁶⁸ constituted incompetency. The Supreme Court reversed the finding of incompetency there as well, holding that while Dr. Tendai's actions violated the standard of care, they did not rise to the level of incompetency.⁶⁹ Further, none of the experts who testified in either *Albanna* or *Tendai* offered testimony that the physician was incompetent, incapable of practicing medicine, or unable to function properly as a physician.

That said, not every allegation of incompetency involves a professional's erroneous decisions made in patient care. In *Kerwin v. Missouri Dental Bd.*, the Board alleged, and this Commission found, that Dr. Kerwin's failure to complete the required continuing education ("CE") hours for the 2002-04 reporting period, as well as his failure to provide accurate copies of CE records to evidence such completion, subjected his license to discipline for incompetence.⁷⁰ The Court of Appeals agreed and affirmed this Commission's decision.⁷¹

We read *Albanna* and *Tendai* as raising the bar for incompetency beyond negligence by focusing on the professional's lack of professional ability or, alternatively, the professional's unwillingness to use the ability (s)he has. And even *Kerwin* (which, like this case, involves a failure of the professional to maintain required documentation) describes an ongoing pattern of behavior that evidences the professional's inability to use his or her own professional ability.

In this case, neither Dr. Glassman's failure to list his practice address(es) on his BNDD registrations obtained before February 28, 2008, nor his writing controlled substance

⁶⁷ Dr. Tendai did not have the equipment to conduct an amniocentesis or non-stress testing. *Tendai*, 161 S.W.3d at 369.

⁶⁸ Dr. Tendai did not refer the mother to a perinatologist out of concern that the only perinatologist available would try to deliver the baby too soon. *Id.*

⁶⁹ *Id.*

⁷⁰ *Kerwin*, 375 S.W.3d 219, 228 (Mo. App., W.D. 2012).

⁷¹ *Id.* at 231.

prescriptions during a time when his registration had lapsed, constitutes evidence of lack of professional ability or unwillingness to use the ability he had. Therefore, we find no incompetency under this count.

Misconduct

As we state above under Count I, misconduct is the intentional commission of a wrongful act. In this case, Dr. Glassman's inactions and delegation regarding the BNDD registration were, arguably, careless, but we have no evidence they were intentional.

Gross negligence

Gross negligence, as we previously noted, is an act or course of conduct demonstrating a conscious indifference to a professional duty that constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.⁷² In this case, Dr. Glassman certainly exhibited an indifference to his professional duty to maintain an active BNDD registration, as well as an indifference to obtaining a registration for addresses where he did conduct patient care and prescribe controlled substances. As to whether that indifference was conscious or otherwise, we believe his explanation that he (and those who worked for him) continued to list his administrative office on his registration as the correct office because he or his staff had listed the administrative office for the prior 28 years, and no one at BNDD had ever said anything. For that reason, we do not find his indifference to be conscious.

Further, the technical error of the violation, combined with BNDD's 28-year lapse before calling Dr. Glassman's attention to it, would lead a reasonable person in Dr. Glassman's situation to act only when alerted to the error, as opposed to his having to divine what his obligation was under BNDD's regulations—which, as we discuss under “The applicable and the cited (and uncited) law” above, are anything but clear on the requirements regarding the address

⁷² *Tendai*, 161 S.W.3d at 367.

he was to list on his registration, and his obligation not to issue controlled substance prescriptions at any other address.

Whether his writing controlled substance prescriptions during a time when his registration had lapsed constitutes gross negligence is a closer issue. What saves Dr. Glassman from a finding of gross negligence is the lack of *conscious* indifference to his professional duty to only prescribe controlled substances while possessing a valid registration to do so. While the Board established that he became aware of the prohibition when he received the February 25, 2008 BNDD letter, it did not establish that he was consciously indifferent to his professional duty while he was violating it. Therefore, we find no cause for discipline for gross negligence under this count.

Fraud, misrepresentation, and dishonesty

As we state under Count I above, fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him. It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive. Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit.

The Board points to no intentional perversion of truth, lack of integrity, disposition to deceive, or any falsehood or untruth made with the intent and purpose of deceit with regard to this count, and we find none in the record. Therefore, we find no ground for discipline for fraud, misrepresentation, or dishonesty.

With regard to his BNDD registration, Dr. Glassman's license is not subject to discipline under § 332.321.2(5).

Section 332.321.2(13) – Professional trust or confidence

The Board alleges that Dr. Glassman's conduct violated the professional trust or confidence of his patients, in that the patients relied on his professional expertise to ensure that

he followed all controlled substance laws and regulations. We describe the standard for determination of the existence of a relationship of professional trust and confidence, and how that relationship can be violated, in “Section 332.321.2(13) – Violation of professional trust or confidence” under Count I above.

In this case, we infer from the facts the existence of a relationship of professional trust and confidence between Dr. Glassman and his patients. That trust and confidence were violated by Dr. Glassman’s failure to strictly follow all laws and regulations relating to controlled substances. Accordingly, we find cause for discipline of Dr. Glassman’s license under § 332.321.2(13) on this count.

Section 332.321.2(15) – Violation of drug laws

As we set out above, the Board alleges Dr. Glassman violated 19 CSR 30-1.019(2). We interpreted that law as requiring the holder of a registration to hold such a registration for each address where the holder dispenses controlled substances. However, the Board failed to establish that Dr. Glassman dispensed any controlled substances *at any address during that period*. The only substance prescriptions the Board demonstrated Dr. Glassman actually wrote were the two prescriptions for hydrocodone /APAP 10-650mg on January 9 and January 21, 2008, during the period when Dr. Glassman had no active BNDD registration.

As we also state above, Dr. Glassman certainly violated § 195.030.2 by issuing prescriptions during a period when he had no active BNDD registration. But we can find cause for discipline only on the law cited in the complaint, and the Board failed to cite this statute. Thus, we find no cause for discipline for its violation.

Dr. Glassman’s license is not subject to discipline for violation of § 332.321.2(15) under this count.

Summary regarding Count III

As to Count III, we find Dr. Glassman's license is subject to discipline under § 332.321.2(13) for violation of professional trust and confidence.

Count IV- Patient Care Complaint

The Board's complaint alleges Dr. Glassman's license is subject to discipline under § 332.321.2(5), (6), and (13) for allegedly cutting the lip of A.B., a minor patient, for failing to provide first aid to A.B., failing to give A.B.'s mother an injury report, and for providing A.B. with poor-fitting retainers that allowed her teeth to improperly shift. In its proposed conclusions of law, the Board appears to expand the grounds for discipline to include paragraphs (1), (15), and (20), which were not set out in the complaint. As noted previously, we cannot find discipline for uncharged conduct.⁷³ We can find cause for discipline only on the law cited in the complaint.⁷⁴ Therefore, we only consider paragraphs (5), (6), and (13) as grounds for discipline.

The Board's factual allegations in this count arise from the testimony of A.B.'s mother. According to the mother, Dr. Glassman cut A.B.'s lip during treatment, failed to inform her (A.B.'s mother) of the cut, failed to provide any first aid to A.B. to stop the bleeding, refused to give the mother an injury report the mother had requested, and provided A.B. with poor-fitting retainers, which allowed A.B.'s teeth to improperly shift.

Dr. Glassman testified that the cut was minor, that he advised A.B.'s mother of the incident, that he and his staff treated the cut at the time by using direct pressure to stop the bleeding, and provided additional cotton rolls if additional pressure to the cut proved necessary. Finally, Dr. Glassman professed ignorance of the nature of the injury report the mother claimed

⁷³ *Dental Bd. v. Cohen*, 867 S.W.2d 295, 297 (Mo. App., W.D. 1993).

⁷⁴ *Sander*, 710 S.W.2d at 901.

she requested but which Dr. Glassman and his staff refused to provide, and the Board did not elaborate on the matter.

In short, the testimony regarding the cut and what Dr. Glassman and his staff did or did not do is directly contradictory. The preponderance of the evidence supports Dr. Glassman's version, not because we found him to be a more credible witness than A.B.'s mother, but because his patient records documenting the incidents of June 29, 2010 corroborate his testimony. Also, the only items of evidence provided by the Board of the events of that day, besides the mother's testimony, were a copy of the mother's complaint filed with the Board and Dr. Glassman's patient records. The mother's testimony simply reiterates what she said in her complaint, while Dr. Glassman's patient records appear to have been made at or near the time of the events of that day, and expressly support Dr. Glassman's version.

Section 332.321.2(5)- Incompetency, misconduct, gross negligence,
fraud, misrepresentation or dishonesty

The Board's complaint recites § 332.321.2(5) *verbatim*, thus alleging that Dr. Glassman's conduct constituted incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of, or relating to one's ability to perform,⁷⁵ the functions or duties of a dentist.

Incompetency

As we state above, incompetency is a general lack of, or a lack of disposition to use, a professional ability, and is a state of being as well, which means that a single, incompetent act is

⁷⁵ See "The Board's wording of § 332.321.2(5) in its two complaints" above for a discussion of the statutory language the Board alternatively excluded and included in its complaints. For Count IV, the accusations of which begin with the complaint for 11-2156 DB, the Board included the language, "*or relating to the dentist's ability to perform,*" in its recitation and application of the statute, and we therefore include it as well.

not, itself, grounds for discipline.⁷⁶ As we also state above, a particular act can violate the applicable standard of care, yet not rise to the level of incompetency.⁷⁷

In this case, even if Dr. Glassman's actions could be described as being more than a single action (we would characterize it as more like a single incident that generated other incidents or events), nothing he did or did not do showed a lack of professional ability or a lack of disposition to use it. We find no incompetency.

Misconduct

As we state above,⁷⁸ misconduct is the intentional commission of a wrongful act. We see no wrongful act, much less any intent to commit it.

Gross negligence

As we state above,⁷⁹ gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty. For this count, the Board failed to show how Dr. Glassman's conduct deviated from his professional duty. Dr. Glassman, on the other hand, cited several cases which, he claims, required the Board to establish the standard of care for gross negligence by expert testimony.⁸⁰ Those cited cases, however, do not stand for that principle, but instead for the principle that the standard of care must be established by expert testimony in cases of ordinary negligence, a matter not at issue here.

It is evident from the record that A.B.'s mother was distressed and dissatisfied by the care A.B. received from Dr. Glassman and his staff. However, that distress and dissatisfaction do not

⁷⁶ See "Incompetency" under Count I.

⁷⁷ See "Incompetency" under Count III.

⁷⁸ See "Misconduct" under Counts I and III.

⁷⁹ See "Gross negligence" under Counts I and III.

⁸⁰ *Hart v. Steele*, 416 S.W.2d 927, 931 (Mo. 1967); *Ladish v. Gordon*, 879 S.W.2d 623, 628 (Mo. App., W.D. 1994); *Dine v. Williams*, 830 S.W.2d 453 (Mo. App., W.D. 1992).

prove Dr. Glassman's gross negligence. Therefore, we find no ground for discipline for gross negligence.

Fraud, Misrepresentation, and Dishonesty

As we state above in Counts I and III, fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him.⁸¹ It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive.⁸² Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit.⁸³

The Board again points to no such intentional perversion of truth, lack of integrity, disposition to deceive, or a falsehood or untruth made with the intent and purpose of deceit, and we find none in the record. Therefore, we find no ground for discipline for fraud, misrepresentation, or dishonesty.

Section 332.321.2(6)- Violation of any provision of Chapter 332 RSMo or any lawful rule or regulation adopted pursuant to said chapter

The Board's complaint alleges that Dr. Glassman's license is subject to discipline because he violated a provision of Chapter 332 or a regulation promulgated pursuant to it. However, the Board failed to identify what statute or regulation Dr. Glassman allegedly violated, nor did it present any evidence to support its allegation. Therefore, we consider the allegation abandoned.

Section 332.321.2(13) - violation of professional trust or confidence

The Board's complaint alleges that Dr. Glassman's treatment of A.B. violated a professional trust or confidence. Then, in its proposed conclusions of law, the Board elaborated on the allegation, stating that "by injuring [A.B.] and then failing to deal reasonably with the injury, [Dr. Glassman] violated a professional trust or confidence[.]" Finally, in its reply brief,

⁸¹ *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910).

⁸² MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

⁸³ *Id.* at 794.

the Board elaborated further, citing A.B.'s mother's testimony that, as a result of A.B.'s injury, she had no trust in Dr. Glassman to perform dentistry on her daughter.⁸⁴

Because we rejected the allegations that Dr. Glassman's treatment of A.B. was inappropriate, we find no cause for disciplining his license for breach of professional trust or confidence.

Summary regarding Count IV

There are no grounds for disciplining Dr. Glassman's license under § 332.321.2(5), (6), or (13) under this count.

Summary

Dr. Glassman's orthodontics specialty dentist license is subject to discipline under § 332.321.2(1), (5), and (13).

SO ORDERED on January 3, 2014.

\s\ Mary E. Nelson
MARY E. NELSON
Commissioner

⁸⁴ Tr. 24-25.